No. 11422

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALFRED SHYMAN, doing business under the assumed name, business and style of ALASKA DISTRIBUTORS COMPANY,
Appellant,

vs.

PHILIP B. FLEMING, Temporary Controls Administrator,
Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OF WASHINGTON, NORTHERN DIVISION

PETITION FOR REHEARING

ADDITIONAL AUTHORITIES

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THE ARGUS PRESS, SEATTLE

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In this supplemental argument designating additional authorities the points will be numbered to conform to those set forth in Appellant's Petition for Rehearing.

1. (Petition for Rehearing, pages 2-3.)

In its opinion this court has stated that M.P.R. No. 194 "is clearly inapplicable to this transaction" because a) "export" is described by the Regulation as "any sale of a commodity by a seller * * * in the continental United States to a purchaser outside thereof" (Note 1, page 2, of the Opinion); and b) "sales and

deliveries to a *buyer* in the Territory of Alaska do not include sales from a seller outside of the Territory of Alaska to a purchaser in the Territory of Alaska" (Note 2, page 2, of the Opinion)

a) It has always been the usage of the United States Customs Department *not* to include the shipment of commodities to Alaska in the "export" classifications. All dictionaries, likewise, designate the word "export" to mean otherwise than the definition applied to Alaska by this court.

The Century Dictionary: Export to means "to carry or to take away; specifically—to send (ocommodities) *to other countries* for sale or exchange. Exportation—the act of exporting; the sending of commodities *out of a country* in trade. The Standard Dictionary defines Export to mean "to carry or send out or away, especially for trade from one country to another. Export—that which is exported; in general, goods or any article of trade or merchandise sent from one country to another; properly, *and as used in the United States Constitution*, goods sent to a foreign country; usually in the plural, as, Exports to Europe. Exportation—Theact or practice of exporting, or of sending out commodities from *one country to another* for traffic or sale. Exporter — One who exports—especilally, one whose business it is to send goods *by way of trade to another country* or region. Custom—A tariff or duty assessed by law levied upon goods exported or imported. Phrases: Customs duty, the tariff or tax assessed upon merchandise imported from or exported to a *foreign* country.

"Whatever primary meaning may be indicated by its derivation, the word 'export' as used in the Constitution and laws of the United States, generally means the transportation of goods from this *to a foreign country*. As the legal motion of emigration is a going abroad with an intention of not returning, so that of exportation is a severance of goods from the mass of things belonging to this country with an intention of uniting them to the mass of things belonging to some foreign country or other."

17 Op. U. S. Attys. Gen. 583.

In this connection the United States Supreme Court confirms such definition wherein it states:

"But, if the question were one of doubt, the doubt would be resolved in favor of the importer 'as duties are never imposed on the citizen upon vague or doubtful interpretations."

Swan & Finch Co. v. U.S., 190 U.S. 143, at 144-146.

The Territory of Alaska belongs to the United States but is not a part of the Union of States under the Constitution * * *. The Constitutional restrictions on the power of Congress to deal with articles brought into or sent out of the United States do not apply to articles brought into or sent out of the "Territory."

Hoover & Allision Company v. Evatt, 324 U.S. 652, at 673-674 (18.19, 20).

It was an "established business practice" since 1933, that whiskey sent to Alaska was not an "export" and such clause should not be interpreted so as "to compel changes in the business practices, * * * established in

an industry" (Emergency Price Control Act of 1942, Sec. 2(h) (Public Law 421, 77th Congress, Chap. 26, 2nd Session, H.B. 5990).

The business practices of this defendant were a direct issue in the *Lake* case and were confirmed by the business practices recited in the *International Shoe Company* case.

> *W. J. Lake & Co. v. King County* (Alaska Distributors, as *Amicus Curiae*) 3 Wn. (2d) 500, rehearing 4 Wn.(2d) 651, certiorari denied, 311 U.S. 715.
>
> *International Shoe Company v. State*, 22 Wn. (2d) 148; affirmed by U.S. Supreme Court, 66 Sup. Ct. 154, at 157-161.

The above cases should be binding upon this court.. *Williams v. Kaiser*, 323 U.S. 471 at 478(i).

b) The Administrator rightly designated that his Regulation No. 194, Amendment No. 10, was the sole regulation applying to sales to *buyers* in Alaska unless any regulation applicable in the United States contained the saving clause "that such prices should apply to Alaska." Regulation No. 193 had no such saving clause, as was demonstrated in the Petition for Rehearing (pp. 2-3). As the Supreme Court has stated, "It is beyond the judicial power of innovation to supply a direct prohibition by construction. We think we should not try to reach the same result by a series of interpretations so far fetched and forced as to bring into question the candor of Congress as well as the integrity of the interpretative process."

> *Western Union Tel. Co. v. Lenrot*, 323 U.S. 490 at 508(10).

That Regulation No. 194 is applicable to this case is established furthermore by the Opinions rendered by Administrator Chester Bowles:

> In the Matter of the *Anchorage Grocery, et al.* Order denying protest. Docket No. 1288-2-P, issued April 8, 1945, and published in Vol. 3, Pike & Fischer's O.P.A. Opinions and Decisions at pages 156-157;
>
> In the Matter of *Otto Kraft & Sons.* Opinion denying protest. Docket No. 1288-3-P, rendered May 12, 1945, and published in Vol. 3, Pike & Fischer's O.P.A. Opinions and Decisions at pages 223-224.

Ae recited in said Opinions of Administrator Chester Bowles, there were no ceiling prices on Tom Burns Whiskey in Alaska until the Amendment of Regulation No. 288 was adopted in April, 1944, practically a year subsequent to the sales consummated in this case (Shyman's Ex. S.1, Amendment 12).

II. (Petition for Rehearing, pages 3-4):

Evidently Appellant's counsel did not make clear to this court that his insistance upon the establishment of a ceiling price for Tom Burns Whiskey *in Seattle by a written order*, did not constitute an attack upon the validity of Order No. 3 under M.P.R. 193. Appellant never has insisted that "the Administrator was without power to establish maximum prices by formula" (Opinion, pp. 2-3).

Counsel for Appellant is not questioning the validity of *any* Regulation. It is true that the Emergency Court of Appeals has the jurisdiction to determine the validity of regulations and not this court. *But Appellant in-*

sists that the applicability of certain Orders or Regulations as opposed to other Orders or Regulations, and interprettions of the language of the applicable Regulaions, are matters for the determination of this court in this proceeding.

May we re-examine for the court some of the pertinent facts in this case. No written order of any kind has *ever* been made by any O.P.A. official establishing a price for Tom Burns Whiskey in Seattle. Appellant's contention herein is that establishing a maximum price for Tom Burns Whiskey in Minnesota (under Order No. 3, O.P.R. 193) has no applicability as to maximum prices for such whiskey either in Seattle or in Alaska. There must have been a further order issued by some O.P.A. authorized official fixing dollars and cents values for the whiskey. It must be affirmatively proven by the Administrator that he properly ascertained and worked out the formula (method) by applying the dollars and cents costs of freight and other expenses designated in the order and that the resultant effect was a designated dollars adn cents value for Seattle in writing by an authorized official. As stated, no such order *by any official was ever issued* as to the price of Tom Burns Whiskey in Seattle, or in Alaska.

The Emergency Court of Appeals has enunciated the law that prices may vary in the same commodity in various localities throughout the United States and its possessions.

> *Supak v. Porter*, 158 F.(2d) 803 at 806, 6, 7).

This court says (Opinion, page 3) that "It is claimed, also, that the formula prescribed was so vague and complex that appellant was unable to ascertain the applicable ceiling prices for his product." Not only was the Minnesota formula (Order No. 3) under M.P.R. 193 "vague and complex" to appellant, but the formula could not be worked out intelligently by *any* O.P.A. official who tried to do so. The oral interpretations of different O.P.A. officials made a variance as to the alleged ceiling price at Seattle, ranging from an overcharge of $53708.48 down to $21809.89, according to the testimony. Even the enforcement attorney who commenced the action was $10000 over the alleged ceiling price, and the testimony of the O.P.A. official upon the witness stand showed that he was in error by $2,000, if another factor in the formula was interpreted differently (Appellant's Brief, p. 37). Appellant's testimony showed that, rightly interpreted, there was an under charge of $20745.38 under the alleged ceiling price (Appellant's Brief, pp. 42-43). Admittedly, then, such "vague and complex" formula should have been interpreted by some authorized official of the O.P.A. by some form of written order, in accordance with the holding of this court in the *Martini* case (*Martini v. Porter*, 157 F.(2d) 35 at 40).

But, says this court, "there were adequate avenues of relief open to him (Appellant) by application to the Administrator for an authoritative written interpretation, or for an adjustment. Appellant resorted to none of the available methods of dispelling his uncertainties."

May we respectfully refresh the memory of the court. As to an "authorative written interpretation," Appellant did everything possible to obtain such an interpretation. On October 7, 1943, a letter was written to the Beverage Division in Washington, D. C., wherein Appellant requested an opinion about the "pricing of Tom Burns Whiskey for shipment to Alaska." To this an answer was received "Prices covering such shipments were established *under an interpretation issued by the Seattle office*" (Shyman's Exhibit S.16). This letter was signed by E. G. Even, head, Beverages and Imported Foods Section, Food Price Division.

Inquiry to the local enforcement officer of the O.P.A. concerning such interpretation caused Appellant's counsel to write again to the Beverage Division at Washington, D. C., to "furnish the information desired by me, as to the items making up the ceiling prices for Tom Burns Whiskey in Alaska, * * * kindly give me the formula followed by your office, * * * will you kindly inform me when such ceiling prices were established * * * (Shyman's Ex. S.17). An answer from the same E. G. Even stating that such information "could best be secured from our O.P.A. office in Seattle. * * * We feel, therefore, that any information relative to that interpretation should be issued by the *originating* office" (Shyman's Ex. S.18).

Consequently, on October 18, 1943, a letter was sent by Appellant's attorney to the local enforcement attorney in which it was stated "Inquiry of Hon J. B. Sholley, Price attorney in Seattle of the O.P.A., revealed that, so far as he knew, the Seattle office had

no written regulation or order on file establishing such prices. * * * Inquiry of Hon F. R. Burries, enforcement officer of the O.P.A., reveals that there is no written ruling or regulation in the Seattle office establishing such prices. * * * That the items of the formula by which said ultimate ceiling prices were worked out were unknown to the Seattle officials of O.P.A. * * * There may be an error in such prices, but such error cannot be ascertained until the items used by your Department in following the formula set up in the O.P.A. Refulations are made known to us. Consequently, may we respectfully request such items. * * * Or, if you cannot give us such items, will you kindly give us the information as to what officials in Washington, D. C., to whom we should write in order to obtain the costs going into such designated prices (Shyman's Ex. S.19).

No answer having been vouch-safed to such request, a letter was written to Hon. Arthur J. Kraus, Director of the Seattle Office of the O.P.A., on November 26, 1943 (Shyman's Ex. S.20) in which the request for items of the formula recited:

November 26, 1943

"Hon. Arthur J. Kraus
Director, Office of Price Administration
White-Henry-Stpart Building
Seattle 1, Washington.

In re Alaska Distributors Co.
Refer to 21973 (JSA:fc(2))

Dear Sir:

Since August, 1943, I have been endeavoring to obtain from officials in the local Office of Price

Administration, in writing, the different items of the formula upon which are based the ultimate ceiling prices in Alaska of $29.40 per case of fifths, $35.77 per case of quartes, and $36.52 per case of pints, for Tom Burns Whiskey, for sales occurring prior to August 31, 1943.

According to the computation as worked out by Mr. J. B. Sholley, and conveyed to me orally, the above stated prices are the established ceiling prices. According to officials in the Enforcement office of the O.P.A. such figures are not accurate. I have endeavored to work out a price upon the formula as orally stated to me, and my figures differ from those of both officials. Heretofore, I have always assumed that the price hereinabove set forth — $29.40 for fifths, $35.77 for quarts and $36.52 for pints—were correct.

Since officials at Washington, D. C., state that the Alaska prices on Tom Burns whiskey 'were established under an interpretation issued by the Seattle office' may I, again, respectfully request from your office the date when such interpretation was made, by whom and where it was made, the figures constituting the formula whereby such ceiling prices were arrived at, and where and when in your office an interested party could have ascertained that such ceiling prices were established and the written memoranda covering such essential information.

Since any suggested compromise in this case involves exact computation of a considerable sum of money, as well as being essential in other pending litigation with another distributor in the State Courts, may I again respectfully request

the furnishing in writing of the essential information hereinbefore requested.

Respectfully,

DANIEL B. TREFETHEN,
Attorney for
Al Shyman d/b/a
Alaska Distributors Co."

No answer to such inquiry was ever received. In this connection it should be noted that there are no forms wherewith an "authoritative written interpretation" may be obtained. As to an "adjustment," an eight-page letter offering $30233.45 as an "adjustment" for an alleged overcharge was merely answered by a return of the check; no information as to the detailed ceiling prices on *any* alleged overcharge was ever received from any O.P.A. official in writing. What more can this court suggest should have been done by Appellant?

This court should also note, factually, that the conditions in the greater part of Alaska are such that for only a few short months can commodities be shipped to Alaska. Thus, Alaska distributors and buyers must accomplish in a short season what can be done throughout the year in the continental United States. On account of such conditions, the price situation had to be handled differently as shown by the decisions of the Administrator in the *Anchorage Grocery Co.* and *Otto Kraft & Sons* cases (Appellant's Brief, p. 29).

This court states that "written interpretations" must be obtained. Such interpretations as to "acquisi-

tion cost" were obtained (Shyman's Exs. S.7, 8, 9), and were being acted upon, such interpretations being in line with the trade practices established since 1934. Nothing more could have been done, than was done by Appellant in this case, to comply with the intricacies and complexities of the O.P.A. Regulations. So much for the facts.

As to the law, the Supreme Court has ruled that even if a challenged regulation has been rightfully appealed to the Emergency Court of Appeals, that court should "refuse to pass on the applicability of the regulation to the petitioners." It left "that question to the District Court before which the treble damage suit is pending" (48, (1, 2). * * *

> "The two modes of securing a hearing on the validity and applicability of the price regulation are cumulative and nto alternative." (49 (3, 4))
>
> *Collins v. Porter*, 328 U.S. 46 at 48 (1, 2).

This court can pass on the validity of the act of Congress which made the Regulations effective retroactively.

> *Case v. Bowles*, 327 U.S. 92 at 98, 66 Sup. Ct. 438;
>
> *Yakus v. U.S.*, 321 U.S. 414, 431, 64 Sup. Ct. 660.

The Emergency Court, to whose decisions this court should defer, has held

> "In the present case the complainants did not attempt to determine their maximum prices under Section 1499.3(c). Instead, they sold their whiskey at prices which the Price Administrator

in the treble-damages suit contends were in excess of the maximum prices established by M.P.R. 193 for their most closely competitive sellers of the same class, if any, and in any event were higher than the level of maximum prices established by that regulation for their commodity. Having thus failed to take advantage of the procedure which was open to them for obtaining a prior precise determination of their maximum prices *they have left open in the enforcement suit in the district court the determination of their proper maximum prices under the regulation.*

"We thus come to the final question in the case. Is the determination of the complainant's in-line maximum prices for the sales which they made in January, 1943, and which are involved in the treble-damages suit in the United States District Court for the Western District of Kentucky to be made by that court in adjudicating that suit or is the determination of those prices which the Price Administrator has made by Order No. 45 valid and, therefore, binding on the district court under Section 204(d) of the Emergency Price Control Act? To put it another way, may the Price Administrator by an order directed solely to *that end determine the ceiling prices applicable to particular past sales* which are the subject of an enforcement suit *brought by him in a district court where one of the issues before the court is the amount of the proper ceiling prices applicable to the sales?*

"(2) As we have seen, Order No. 45 was directed solely to the past. Its object was to determine exactly for the purpose of computing damages in the enforcement suit of the maximum prices for complainants' sales which Section

1499.3 of the GMBR (as incorporated by reference in Section 1420.13(c) of MPR 193) imposed upon them. * * * Here, however, the complainants did not request the Price Administrator to act *but left the question of their maximum prices wholly open for judicial determination. The sole purpose of the order, therefore, was to adjudicate a question which the Price Administrator by instituting the trble-damage suit, had himself previously committed to the district court. We think that the Price Administrator was without power to make a determination, through the medium of what purported to be a retroactive price order, of the question thus committed to the district court.*"

"The price regulations and orders authorized to be issued by the Price Administrator under Section 2 of the act, 50 U.S.C.A., Appendix 902, and which are incontestable in the district courts under Section 204(d) are limited to those which will effectuate the purposes of the act. Order No. 45 did not effectuate any one of those purposes, however."

"Since its only object was to liquidate the damages in a pending suit between the Price Administrator and a group of alleged over-ceiling sellers it could only derive its authority from the act if one of the purposes of the act was to authorize the Price Administrator *to decide issues of fact with respect to past transactions which he himself has already committed to a court of adjudication.* We are satisfied that Congress had no such purpose in mind in passing the act and it is most doubtful whether Congress could have so provided if it had desired to do so. For, as we recently had occasion to say in *Lee v. Fleming*

(Em. App. 1946) 158 F.(2d) 984, 'such action would not only appear to involve the usurpation of judicial power which is vested in the courts alone, but would also *clearly be at war with the fundamental concept of due process of law that parties to controversies are entitled to have them determined by an impartial tribunal.*

"The question to which Order No. 45 is directed, the level of maximum prices established by MPR 193 for the bulk whiskey, is a factual one with which the district court is quite as competent to deal as is the Price Administrator. Indeed, it is just the sort of problem with which courts are called upon to deal every day and for the solution of which the judicial process is designed. The question is not a legislative one nor has Congress committed it to the exclusive determination of the Price Administrator. *On the contrary the Price Administrator himself has committed it to the district court by instituting the treble-damages suit in which it is a major issue.*

"For the reasons stated we conclude that Order No. 45 is not in accordance with law and is, therefore, invalid. It accordingly becomes unnecessary for us to discuss the other questions raised by the complainants. * * * A judgment will be entered declaring that Order No. 45 issued on June 13, 1945, under Section 1499.3(c) of the General Maximum Price Regulation was invalid from the date of its issuance." * * *

(On Rehearing):

"We held that Order No. 45 was neither authorized by Section 1499.3(c) of the General Maximum Price Regulation, under which it purported to be issued, nor by Section 2 of the

> Emergency Price Control Act, 50 U.S.C.A., Appendix 902, which gives general authority to the Price Administrator to issue price orders, and that Order No. 45, was therefore invalid. We do not regard Section 1499.3(c) of the GMPR *as authorizing or contemplating a retroactive price order of the character of Order No. 45 to be made by the Price Administrator in the absence of* an application by a seller. Whether the regulation authorizes such an order to be made upon application of the seller is a question not before us. * * * It was, as we have just stated, that the order was invalid because it was not authorized by the regulation or the act. Objections upon this ground were clearly stated in each of the protests. It is true that we suggested that if the act had authorized such an order as Order No. 45 it might *well have been unconstitutional as involving unsurpation of judicial power but our conclusion was that Congress had no such purpose in mind in passing the act.*
>
> *Collins v. Fleming*, 159 (F.(2d) 431 at 437, 438, 439.

The foregoing decision is important in two respects: (1) It establishes that it was the Administrator's own opinion that an order establishing dollars and cents prices at the place of sale was a necessity — which is Appellant's contention herein. (2) It seems to be at variance with this court's decision wherein an ex post factor order establishing prices was upheld.

Martini v. Porter, 157 F.(2d) 35, 40.

In a case where the facts are somewhat similar the court has held:

"*Since the Act and the regulation do not establish any specific ceiling price for the commodity sub judice, defendants are entitled to know not only what the government claims the ceiling price to be, but also the manner in which it arrived at this conclusion.* It may be that the government's method of calculation is erroneous. If so, defendants should have the opportunity to challenge this defect if, in fact, it exists. * * *

"*If the government erroneously computed the ceiling price, defendants should have the opportunity to object to such error without the necessity of standing trial.* * * *

"*We do not know how the ceiling price was computed by the draftsmen of the indictments.* Defendants, therefore, have no means of testing the accuracy of the pleaded conclusion that the ceiling price, for the transactions occurring subsequent to April 22, 1943, was any particular figure. * * *

"* * * Since no ceiling price is fixed in Regulation 269, the indictment must show how the grand jury arrived at the ceiling price for the particular defendant for, as I said before, a defendant should be permitted to take advantage of a faulty calculation before trial and consequently he should be informed of all mattrial elements that go to make up the crime. I accordingly refuse to alter the result of my original opinion."

United States v. Johnson, 53 F. Supp., pp. 170, 171, 172, 173.

"There are two roads pointed in this statute. One is for the citizen in his protest, and his rem-

edy. That road leads to the Emergency Court at Washington, and to the Supreme Court. *The other road is for the use of the Administrator. He enters court against the citizen. That court is neither the Emergency Court nor the Supreme Court. It is any state or national court which has jurisdiction of the controversy. It is the local court. That is the road upon which the parties arrive here.* * * *

"The general authority given to the Administrator to make regulations is that they shall be 'Generally fair and equitable'. * * *

"The defendant in accepting battle where it was begun by the complainant, does so by stating that the Administrator is seeking to enforce regulations that are not 'generally fair and equitable.' That there is another provision of the Act which vests 'exclusive jurisdiction' in the Emergency and Supreme Court to pass upon the 'validity' of regulations, and to stay orders made by the Administrator, is not a sufficient answer nor a sufficient program as to what shall take place in and upon this voyage. * * *

"Whether the defendant shall get anywhere in its attack upon regulations made by the Administrator for the defendant's business, is beside the question. We do not need to argue that one may not enter court until he has exhausted his administrative remedy. *We all know that.* The requirement for such entry is no novelty. * * *

"We must bear in mind that the litigation as to jurisdiction of other courts to do what the Emergency Court and the Supreme Court is given the power to do, does not limit the trial court upon the second road, to *require the Administra-*

tor to make out his case before he shall be entitled to restrain the citizen. In the making of that case, the citizen has his rights. He is called into court.

* * * * * * * * * *

"The only way to give the citizen such right is to preserve his right to plead and to present his testimony and then to determine whether he is correct, or, whether the plaintiff is correct. * * *

"One may conceive of such a lack of 'equity' as to deny the complainant the restraint he prays, and yet in no way interfere with the 'validity' of a regulation. * * *

"Upon argument in open court, it was contended that certain errors had been made by the Administrator as to bacon, which the later corrected. That certain errors had been made with reference to tea by itself, and tea with a glass, and that certain mistakes had been made concerning the sales of bread. * * *

"That is the sort of inquiry that the court permits under the general idea and the prominent requisite that a regulation must be 'fair and equitable.' Equity being the overhead dominant as to both the plaintiff and the defendant in this suit." * * *

Brown v. Wyatt Food Stores, 49 F. Supp. 538.

"*We think counsel's zeal and enthusiasm for the sanctity of such interpretations are hardly warranted. This doctrine would relegate the statutes of Congress to an inferior position unjustified even in these times when the compulsion*

of an emergency compels us to clothe administrative agencies with extraordinary powers. * * *

"(1) We do not accept the Administrator's view that he may promulgate a regulation and *then place on it an interpretation which becomes controlling on the courts.* The Administrator has not grown to any such stature. *The courts may consider his interpretations and follow them, if correct, but the court is not bound to follow them.*" *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 325, 53 S. Ct. 350, 77 L. ed. 796; *Bowles v. Nu Way Laundry Company*, 10 Cir., 144 F.(2d) 741. * * *

"(2-4) We think the District Court had a right to determine the meaning of these regulations for itself, although it could not, and did not, undertake to pass upon their validity, since that authority resides in the Emergency Court of Appeals and in the Supreme Court. Section 204, Emergency Price Control Act 1942, 50 U.S.C.A. Appendix §924. Having made its own interpretation, the District Court was justified in rejecting the Administrator's interpretation of these regulations."

Bowles v. Simon, 145 F.(2d) 334 at 336-337. (Cir. Ct. of App. 7th Cir.)

"Misinterpretation of regulations by the Administrator need not be followed by the courts. particularly if they are merely arbitrary edicts of the Department."

Norwegian Nitrogen Prod. Co. v. U. S., 288 U.S. 294 at 318 (77 L. ed. 796 at 809.)

It should be noted that our actions in requesting

information followed the procedure directed by the Administrator himself.

> "At the outset Protestant had available to it an alternative other than an attack on the validity of the regulation. *It could have requested that the Administrator, or one of his subordinates authorized to make interpretations, interpret the regulation so as to enable Protestant to know whether it applied to its sale, and how, if it did apply, its maximum prices were to be determined. This appears to be the most reasonable procedure when doubt exists in a seller's mind.* A seller may, of course, have no doubts, having satisfied himself by a reading of two regulations as to which is applicable to him. In that case he is at liberty to argue the correctness of his interpretation, and possibly, as in Protestant's case, *to persuade a court having jurisdiction of an enforcement action.*
>
> "Where the Administrator had issued an order under M.P.R. No. 188 instead of under General M.P.R. *'it is still open to the Protestant to challenge in the pending enforcement action, the Administrator's interpretation.*"
>
> Opinion of Chester Bowles, Adm., P. & F. O. P. A., Opinions and Decisions Vol. 3 p. 303 at 304.

The Emergency Court of Appeals holds "We have decided that where a District Court in an enforcement proceeding has interpreted a regulation as being applicable * * * we must *accept the District Court's interpretation.*"

Van Der Loo v. Porter, 160 F.(2d) 110, at

112. (1). (Emergency Court of Appeals, September 5, 1946.)

Conklin Pen Company v. Bowles, 152 F.(2d) 764 at 766 (4, 5).

"The propriety of the classification as a matter of fact and the interpretation of the regulations are questions for the enforcement court; as to them we refrain from gratuitous expression of opinion."

Gordon v. Bowles, 153 F.(2d) 614, at 615. (1-3), 616.

With respect to the doctrine that "Congress was satisfied that ample safeguards against arbitrary exercise of the allocation powers would be afforded by procedures within the administrative agencies themselves (264),the coordinate District of Columbia Court of Appeals has stated "If applied to a specific Congressional prohibition, that doctrine would spell executive absolutism, a concept unknown to our law * * * if the judiciary has no power in such matter, the only practical restraint would be the self restraint of the executive branch. Such a result is foreign to our concept of the division of powers of the government."

Fleming v. Moberly Milk Products Company, 160 F.(2d) 259 at 264, 265, 266.

In the footnote (13) of the foregoing case, an extended quotation of legal authorities, upholds the legal doctrine "whether the agency acts within the authority confered or goes beyond it, whether there is compliance with the legal requirements which fix the prov-

ince of the agency, are appropriate questions for legal decision."

Fleming v. Moberly Milk Products Co., 160 160 F.(2d) 259 at 265. (Footnote 13)

In its opinion (p. 3) this court says Appellant "concededly paid above-ceiling prices to his suppliers" * * * "It seems plain that the phrase 'the price at which the commodity was acquired' can not fairly be construed to include an over-ceiling price. * * * The rational interpretation of the provision is that it has reference to an acquisition cost not violative of law."

With respect to such statements, may we, respectfully, be not too technical in stating that we are not charged in the complaint with "purchasing over the ceiling price."

However, Appellant has attempted herein to show that no suppliers over ceiling price was established in Seattle by any written order in this case, nor by any interpretation of any authorized O.P.A. official.

Appellee made reference to an obscure "interpretation" made in November, 1942, that no such "illegal" price cuold be paid. But it is significant that no order or regulation to that effect was ever made by the Office of Price Regulation and without such an order or regulation—necessarily publishable in the Federal Register—the interpretation has no binding effect according to the decision of this court.

F. Uri & Co. v. Bowles, 152 F.(2d) 713 at 715, 718.

In this case may we recall to the memory of the court that between April 5, 1943 and date of the

correcting amendment in May, 1944, there was no order or interpretation in existence about legal price (Appellant's Brief 47).

The Regulation of April 5, 1943, fixing price under Order No. 3 contains no saving clause that all outstanding regulations and interpretations thereof were to be deemed continuingly valid, nor is there any intimation warranting such an implied limitation. There must be the Administrator's determination of its need (Appellant's Brief pp. 44-56).

As the Supreme Court states "This is too substantial a qualification to be made by judicial interpolation."

"* * * The legislation was too specifically directed against prior unauthorized regulation promulgated no doubt with the best of motives in the great effort against inflation, for us to give it a meaning other than that which the language in the context of its history yields. * * * But the accommodation of the various interests involved in a system of price control are for Congress and not for us, and we must construe its legislation as fairly as we can to catch the will behind the words" (54-55).

Thomas Paper Stock Company v. Porter, 328 U.S. 50 at 54-55.

It will be noted that in the above case the Supreme Court stated that between the effective date of July 16, 1943, and the date of September 11, 1943, where the Administrator made his amendatory order, there was no maximum price upon sales of waste paper and that the price theretofore promulgated prior to July

16, 1943, could not be deemed as "continuingly valid, nor is there any intimation warranting such an implied limitation" (54) (45). It should be noted, furthermore, that the Supreme Court in that case stated that the regulation established "dollars and cents ceiling prices" for the sales of paper (57).

May we again reiterate that in our case the alleged unregistered interpretation was given upon a different worded sentence and that the so-called interpreted sentence was not repeated in the amendment to the regulation was made that "the price paid for the of merchandise was made by appellant.

It was not until Amendment No. 12 to Regulation No. 194, *adopted April 11, 1944*—nine months after the consummation of the sales in this case—that any regualtion was made that "the price paid for the commodity is no higher than the supplier's ceiling" (Reg. No. 194, Amendment 12, Sec. 1418.63(a)(4) amended) (Shyman Ex. S. 1).

The Supreme Court has ruled that

> "At any time after the issuance of any regulation or order * * * *or in the case of a price schedule at any time after the effective date thereof* * * * any person subject to any provision of such regulation, order, *or price schedule*, may, * * * file a protest by the (1944) Amendment of Sec. 203 (a) (Stabilization Extension Act of 1944 Sec. 106, 50 U.S.C.A. Appendix Sec. 923 a(2)). The Supreme Court of the United States has held that such protest proceeding may be filed against any provision of a price schedule issued by the Price Administration at any time after the *effective date of the schedule*, notwithstanding the

right or protest had expired through non-user under the act of 1942."

Utah Junk Co. v. Porter, 328 U.S. 39 at 44 (2).

In that case Mr. Justice Frankfurter states (P. 44 (3).):

"All construction is the ascertainment of meaning, and literalness may strangle meaning. But in construing a definite procedural provision we do well to stick close to the text and not import argumentative qualifications from broad, *unexpressed* claims of policy. * * * Congress liberalized the right to challenge the validity of price regualtions so extensively as it did, even reviving rights theretofore lapsed, because it felt, as we have seen, *that rights were unfairly lost through unfamiliarity with the technical requirements of emergency legislation. Price fixing is not static, it is a continuing process.* The considerations of fairness that led Congress to give relief are the same whether a regulation was revised or remained unchanged. There is not a hint that Congress intended to draw a line so artificial as the one the Administrator would have to draw."

Utah Junk Co. v. Porter, 328 U.S. 39 at 44 (3).

It would seem to Appellant that this court has acquiesced in his argument that the "export" regulations deal with commerce to foreign countries—hereinbefore argued—in its statement that the declared purpose of the O.P.A. Act was "to prevent excessive diversion of American goods to foreign markets * * *"

(Decision, page 4). Alaska is not a "foreign" market but is a territorial dependency of the United States governed by laws specificaly made applicable thereto by the United States Congress and the agencies thereof. In the case of the O.P.A. it is admitted that price control in Alaska was governed by M.P.R. No. 194—instead of M.P.R. 193 under which Appellant was charged with violation in this case—and it is admitted by Appellee that there was no ceiling price for the sale of whiskey in Alaska until 1944, months after the sales had been made by Appellant (Appellant's Brief, pp. 19, 24-25).

As to the decision of this court that only the Emergency Court can pass upon the applicability of the regulation that "established business practices" cannot be disturbed by an unwritten interpretation of the law by the O.P.A. officials, under the *Yakus* case, it would seem that both the Supreme Court and other coordinate courts have decreed that Appellant's course was correct, as set forth in his brief herein.

Appellant's violation, if any, according to this court, was in its purchase by an over-ceiling "domestic" price of the commodity from K & L Distributors at Seattle. Appellant still feels that this court, in the use of its chancellory powers, could have offset the overcharge herein when it has held that K & L Distributors have paid in full the amount of such overcharge.

III. This court has dismissed as "without merit" Appellant's contentions that the Fifth, Fourteenth and Twenty-First Amendments of the United States

Constitution are applicable as a relief to Appellant in this case. May we elaborate somewhat upon such contentions by quoting additional decisions made since the date of the trial of this case. The Commerce clause of the Constitution was exhaustively briefed (Appellant's Brief, pp. 21, 22, 50) and, consequently, it is unnecessary herein to reiterate what was then said.

Hereinbefore, we have pointed out that we not only requested from the authorized officials of the O.P.A. a written statement of the price structure applicable to Appellant's sales and we have urged that "the failure of any written interpretation has deprived Appellant of a valuable constitutional right of attacking the validity of the actions of the O.P.A. officials in this case" (Appellant's Brief, pp. 80, 81). Manifestly, it is impossible to file a protest and appeal therefrom to the U. S. Emergency Court of Appeals, on a mere *oral* interpretation. Such protest procedure is based upon some regulation or order of an authorized official. If all such authorized officials refuse to answer requests for interpretations—as did the officials in this case, as hereinbefore demonstrated—then Appellant is precluded from obtaining relief from the Emergency Court of Appeals. Being so precluded, Appellant's *only* redress is in this court.

This court in its Opinion has relied upon the *Yakus* case as establishing that the "validity of the regulation must be determined by the Emergency Court of Appeals."

But the *Yakus* case states "as we have pointed out such a requirement is objectionable only if by stat-

utary command *or in operation* it will deny, to those charged with violations, an adequate opportunity to be heard on the question of validity. And, as we have seen, petitioners fail to show that such is the necessary effect of the present statute, or that if *so applied as to deprive them of an adequate opportunity to establish the invalidity of a regulation* there would not be an adequate means of securing appropriate judicial relief in the course either of the statutory proceeding or of the criminal trial (446, (38))" * * *.

> "Nor do we consider whether one who is forced to trial and convicted of violation of a regulation, while *diligently seeking determination* of its validity by the statutory procedure may thus be deprived of the defense that the regulation is invalid. There is no contention that the present regulation is void on its face, petitioners have taken no step to challenge its validity by the procedure which was open to them, *and it does not appear that they have been deprived of the opportunity to do so. Even though the statute should be deemed to require it, any ruling at the criminal trial which would preclude the accused from showing that he had had no opportunity to establish the invalidity of the regulation by resort to the statutory PROCEDURE, WOULD BE REVIEWABLE ON APPEAL ON CONSTITUTIONAL GROUNDS.*"
>
> *Yakus v. United States*, 321 U.S. 414 at 446-447 (38).

Again, may we emphasize to this court that the District Court iterated and reiterated that "I have never seen proof in any case of more good faith on the part

of the citizens to try to comply with the O.P.A. statutes and regulations" (Appellant's Brief, Appendix, pp. 4-5). Under such circumstances, the following language of the Emergency Court of Appeals would seem to be worthy of consideration by this court.

> "Two succeeding paragraphs of the same section of the statute are pertinent. (9) Paragraph (d) (Sec. 205, Act of 1942) says that no person shall be liable for damages for anything done "in good faith pursuant to x x x any regulation, x x x notwithstanding that subsequently such x x x regulation x x x may be modified, rescinded, or determined to be invalid. Paragraph (e) of the same section provides that if a person "violates" a regulation he shall be liable for damages not less 'than the amount of the overcharge, even if the violation was neither willful nor the result of a failure to take practicable precautions against the occurrence of the violation."
>
> "(5, 6) The provision in paragraph (d) that damages shall not lie for an act done *in good faith pursuant to a regulation even* if that regulation be subsequently modified, is striking. One would assume that damages would not lie under those circumstances without any such statutory prohibition. The insertion of the novel precaution serves to emphasize that a modification of a regulation does not carry *retroactively* a liability for damages. That provision makes necessary a sharp distinction between a mere interpretation by the Administrator and a modification by him of a regulation. *Moreover, when the statute refers to an act in good faith pursuant to a regulation, it seems to contemplate the contingency of a doubt as to the meaning of the regulation.* If

the meaning be certain, and an act be pursuant to it, no requirement of good faith would seem to be requisite to non-liability. The requirement that an act "pursuant to" a regulation be in good faith has significance only if the meaning of the regulation be uncertain. Thus it appears that if one acted according to what was in all good faith the apparent meaning of the regulation, damages will not lie. *The emphasis here must be on the good faith.* The statute does not permit the conjuring up of a possible meaning as a protection. Full effect must be given the stringent requirements of paragraph (e) relating to violations, *but equally full effect must be given to paragraph (d).*"

"*The District Court found as a fact that Mrs. Van Der Loo acted in good faith. No dispute is offered to that finding.* The Administrator says that his ruling of April 25, 1945, was an interpretation of the regulation; that it was a proper interpretation, and that, therefore, any deviation from it was, from the beginning, a violation."

"Section 2 of the regulation was headed "How to find your ceiling prices under this regulation." It plainly directed retailers to compute their ceiling prices by applying "markups."

"If the wholesaler's price be not violative of the requirements of price control, no reason would dictate that the retailer take a loss on that price. Any concept of price control would necessarily contemplate that prices at one level would follow through in normal course in ascending grades to the consumer. This is simple sense. So that a student of these regulations observing the failure

to mention sales prices below cost in the base period, would readily and reasonably conclude that the Administrator meant that ceilings in cost price lines where sales below cost had predominated in the base period should be fixed by the rule applicable where no sales of that line had occured in that period. In the language of the regulation, he could reasonably conclude that the Administrator meant that such ceilings were to be fixed by Rule 2. It was reasonable that sales below cost be treated as no sales."

"Furthermore, the Administrator himself later amended the regulation to cure this conceded anomaly. And when he did so, he announced that a nationwide survey showed that the number of these abnormally low markup relationships was sufficiently small to preclude any possibility of a general price rise resulting from the action taken in the amendment. He pointed out that these retailers had been unable to purchase merchandise because of the clearance sale retail price they would have to use. In the amendment he promulgated a rule not only for the relief from base-period sales below cost but for all base-period markups more than 20 percentage points below the average for the category. This was his view of what had to be done, and what was reasonable to do, as he looked at the results of his interpretation of the revised regulation."

"The Administrator's position in the case at bar is the barest technicality."

(8) The Administrator's ruling here involved was in the form of a letter written in this particular case by a local enforcement officer. Technically it automatically became an official act

of the Administrator by operation of a general proedural rule of his office. But it was not a published ruling, nor, so far as the record shows, was it public. It was not an administrative interpretation of long standing *but was made after this controversy had arisen;* was written two years after MPR 330 was issued, and was thereafter nullified by Amendment No. 5. Thus, it does not carry the great weight of presumptive validity which *attaches to long-continued, consistent, published administrative rulings.*"

"The Administrator says that his letter to Mrs. Van Der Loo was an interpretation. But if, in fact, it was a change in meaning, it was a modification. He had power either to interpret or to amend. But if the Administrator really changed the meaning of the regulation, he could not thereby render liable to damages a retailer who in good faith had theretofore pursued the original regulation."

"(9, 10) *The District Court gave appellee the benefit of her clear good faith* and so, in effect, held that she was not "violating" the regulation; and that in following what was both its letter and its sense, she was acting pursuant to it within the meaning of the two pertinent paragraphs of the statute. We agree with that view. The ordinary meaning of "markup" does not include a sale below cost, and that ordinary meaning is consistent with the purpose of the Act and with the later thought of the Administrator. We think it was the meaning of the regulation and that the "interpretation" was really a change in meaning."

"The question is not whether the ruling of the

> Administrator was valid prospectively as an administrative regulation. The question is whether it was so clear a translation of the terms of the original regulation as to render retroactively the prices of this retailer a violation of that regulation."

Thus, Mrs. Van Der Loo seems to have had no judicial decision upon her contention as to the proper interpretation of the regulation.

> *Fleming vs. Van Der Loo*, 160 F.(2nd) 906, at 911, 912, 913.

On August 15, 1947, the U.S. District Court of Appeals, 7th Circuit, in a case where the undoubted good faith of the defendant was proven, decided:

> "We are not unmindful of the important rule performed by plaintiff during and following the recent war and of the almost superhuman difficulties with which it was confronted. Neither are we unmindful of the difficulties confronting a person in business who honestly and in good faith attempted to comply with the innumerable price lists and regulations which were promulgated by the plaintiff. It is a matter of common knowledge that an individual merchant with two or three employees under his personal supervision was unable, however good his intentions, to achieve complete compliance in the matter of prices. Often he was confused and bewildered in an effort to interpret the regulations, much less obtain compliance. As the magnitude of a business increased, with its personal supervision further removed, we apprehend that the difficulties were correspondingly enhanced. Certainly

100% compliance could not be expected in any event; in fact, it would be impossible." The Court dismissed the case.

> *U.S. ex rel Paul A. Porter, Adm. vs. Kroger Grocery and Baking Company.* (Decision rendered Aug. 15, 1947; not yet in Federal Advance Sheets.)

It is appellee's contention, now upheld by the opinion of this Court, that Kessler & Levine, doing business as K & L Distributors, *sold and delivered* the liquor in this case, to Alfred Shyman, doing business as Alaska Distributors Company, in the City of Seattle, State of Washington; that such sale *and delivery* constituted a *domestic* sale in said State of Washington, and that thereby a Seattle "*domestic*" price was the established price upon which Appellant Shyman must base his figures for sale to his customers in Alaska; and that by such circumstances Appellant Shyman became an "exporter" from Seattle to the Alaska business locations of his customers.

Under the basic law of the State of Washington it is provided in Section 23-J, (Shyman's Exhibit S. 22) Pamphlet of the Washington State Liquor Act, "A liquor importer's license may be issued to any qualified person, firm or corporation, entitling the holder thereof to import into the State any liquor other than beer; * * * " to store the same within the state; *and to sell and export the same from the state;* * * * "

In accordance therewith K & L Distributors had the right under their Importer's License to import

such liquor. But K & L Distributors' duty under the law was to "*sell and export the same from the State.*" (Appellant's Opening Brief, pp. 20-22; Appellant's Reply Brief, pp. 2-4.) There could be no break in the "current of commerce by the ORAL declaration of an O.P.A. official that the liquors had come to rest in Seattle whereby a "domestic" price would be applicable thereto.

Under the 21st Amendment to the United States Constitution the State of Washington had the undoubted right to insist that no liquors could be sold within the State except under such conditions as it prescribed. The sole control of the liquor while within the confines of the State was entirely within the powers of the Washington State Liquor Control Board, and such liquors were always subject to the rules and regulations of such Board. Under such regulations the Washington State Liquor Control Board had provided (Section 89, Shyman's Exhibits No. 22, p. 93) that such liquor must be stored in a storage warehouse under the Board's control and that "no liquor shall be removed from any storage warehouse except for sale or delivery to the Board *or for export from the State.*" (Section 97, Shyman's Exhibit No. S 22, Page 94)

Under the law of the State of Washington, therefore, Appellee's ORAL interpretation that there was a "domestic sale at Seattle" and that K & L Distributors sale was not an export sale should not be upheld by this Court.

It may be that if the O.P.A. officials had estab-

lished a price at Seattle of the Tom Burns Whiskey in this case by any *written order or written interpretation*, there might have been presented the question as to whether the O.P.A. under its war time powers had the precedent right to establish prices in the State of Washington without the acquiesence of the Washington State Liquor Control Board. But, assuredly under the facts of this case wherein such *local* sale in Seattle was being asserted only by oral interpretation of O.P.A. officials, the undoubted right of the State to insist *that there can be no sale except for export purposes*, should be upheld by this and other courts.

As was said hereinbefore, it was not one of the purposes of the O.P.A. Act of 1942 to permit the Administrator to say *orally* that Appellant's purchase was a "domestic" sale. The Administrator's *only* power was to fix prices.

> *Collins v. Fleming*, 159 F.(2d) 431, at 437, 438, 439.

The Supreme Court of the United States in its decisions in recent years has invariably upheld the right of the State to control the sale of liquor within its borders under the 21st Amendment to the Constitution of the United States.

Mr. Justice Brandies states that the 21st Amendment confers "upon the state the power to forbid all importations which do not comply with the conditions which it prescribes." (62 * * * A classification recognized by the 21st Amendment cannot be deemed forbidden by the 14th Amendment (equal protection

clause) (64) * * * To say that, would involve not a construction of the (21st) Amendment, but a rewriting of it. (62) * * *

State Board of Equalization v. Youngs Market Inc., 299 U.S. 59, at 62, 63, 64.

Mahoney v. Joseph Triner Corporation, 304 U.S. 401, at 403, 404.

"The substantive power of the State to prevent the sale of intoxicating liquor is undoubted * * * Since the 21st Amendment, as held in the *Young* case, the right to prohibit or regulate the importation of intoxicating liquor is not limited by the Commerce clause and * * * discrimination between domestic and imported intoxicating liquors, is not prohibited by the equal protection clause. (394.)"

Indianapolis Brewing Company v. Liquor Control Commission, 305 U.S. 391 at 394.

Joseph S. Finch & Company v. McKittrick, 305 U.S. 395, at 397, 398.

(Justice Reed):

"The State of Virginia 'could conclude * * * that she could not safely permit the transportation of liquors through her territory by those who concedely mean to break Federal Laws (138)" * * *

(Justice Black):

"The 21st Amendment has placed liquor in a category different from that of other articles of commerce * * * this much is settled; local, not national, regulation of the liquor traffic is now the general Constitutional policy (138) * * *

Virginia seems to think that, unless adequate protectionary regulations are devised and enforced, liquor shipments ostensibly being transported through her territory to a neighboring state could be diverted to bootleg purposes contrary to her laws. (139)" * * *

(Justice Frankfurter):

"The 21st Amendment prohibits the 'transportation or importation into any State * * * of intoxicating liquors in violation of the laws thereof', not when the liquor is for delivery and use but 'for delivery or use therein.' In other words, liquor need not be intended for consumption in a State to be deemed to be imported into the State and therefore subject to control by that State. (141) * * * Since Virginia has power to prohibit the importation of liquor within that Commonwealth, it may effectuate that purpose by measures deemed by it necessary to prevent evasion of its policy by pretended through shipments. In a word, having the power to prohibit liquor from coming into a State, a State may take measures against frustation of that power. (142) * * *

Carter v. Commonwealth of Virginia, 321 U.S. 131 at 137-138.

Justice Frankfurter has stated:

"Price fixing is a restraint upon trade." * * * "The 21st Amendment subordinated the Commerce Clause to the power of the state to control, and to control effectively the traffic of liquor within its borders (300) * * * as a matter of constitutional law, the result of the 21st Amendment is that a State may erect any barrier it pleases to the entry of intoxicating liquors (300)

* * * If a state for its own sufficient reasons deems it a desirable policy to standardize the price of liquor within its borders either by a direct price fixing statute or by permissive sanction of such price fixing in order to discourage the temptation of cheap liquor due to cutthroat competition, the 21st Amendment gives it that power and the Commerce clause does not gainsay it." (301) * * *

U. S. v. Frankfort Distilleries, 324 U.S. 293, at 301.

Justice Jackson recites:

"These clauses of the 21st Amendment create an important distinction between state power over the liquor traffic and state power over commerce in general. The people of the United States knew that liquor is a lawlessness unto itself. They determined that it should be governed by a specific and particular constitutional provision. * * * It was their unsatisfactory experience * * * that resulted in giving an exclusive place in constitutional law as a commodity whose transportation is governed by a special constitutional provision. (398, 399) * * * So the 21st Amendment made the laws as to delivery and use in the State of destination the test of legality of interstate movement. This obviously gives to state law a much greater control over interstate liquor traffic than over commerce in any other commodity.

"If the 21st Amendment is not to be resorted to for the decision of liquor cases, it is on the way to becoming another 'almost forgotten' clause of the Constitution." (390) * * *

Duckworth v. State of Arkansas, 314 U.S. 390, at 398, 399.

"There can be no delivery to one not authorized to receive liquor."

ziffrin Inc. v. Reeves, 308 U.S. 132 at 140 (12).

This court has said:

"The decisions of the Supreme Court since the adoption of the 21st Amendment recognize the practically unlimited power of the states to regulate or prohibit the transportation of alcoholic beverages, irrespective either of the commerce clause or the equal protection clause of the Constitution. (966) * * * Interstate Commerce in liquor, *not in violation of state laws*, was left matter of national concern. (967) * * * The broad theory of the Sherman Act—that trade should be free of artificial restraints—is in many respects incompatible with the policy of state liquor control legislation; and wherever such conflict exists the Sherman Act must give way, just as the Commerce Clause itself gives way in identical circumstances. Where invocation of that Act tends to hamper or interfere with the enforcement of State Laws regulatory of the transportation or importation of intoxicants, the *Act* is *unenforceable.* By the terms of its own fundamental law the national government has disabled itself from prosecuting as an offense that which a state has commanded or implicitly encouraged as a means of controlling the traffic of intoxicants within its borders," (963, (3)) *Washington Brewers Institute v. United States*, 137 F.(2d) 964 at 966, 967, 968.

Again, it should be reiterated, that the O.P.A. under its war powers may place a maximum price upon

"legal" or "illegal" whiskey. But we are contending herein that when the State of Washington has declared that a "domestic" sale of whiskey cannot be made within its boundaries no unauthorized official of the O.P.A. by an oral interpretation and without any written order or regulation, and with no written price fixing, may declare that such transaction is a *sale in the state*—whether legal or illegal.

Other decisions of the Supreme Court seem applicable to the facts of this case.

The war power of the United States, like its other powers, is subject to applicable constitutional limitations.

> *Hamilton v. Kentucky Distilleries & Warehouse Company*, 251 U.S. 146 at 155. (Mr. Justice Brandies)

A defendant in an enforcement proceeding has a right to challenge, on constitutional grounds, whether or not a procedure has been "properly interpreted."

> *Case v. Bowles*, 327 U.S. 92, at 98 (7).

> "Where the method pursued by the Department is fundamentally erroneous it constitutes a denial of due process of law and the courts do not have to upheld the interpretations of department officials."

> *N. P. Ry. v. Dept. of Pub. Wks.*, 268 U.S. (80 L. ed.) 836 at 839 (Wash.).

> *C. M. & St. P. Ry. v. Pub. Util. Cm.*, 274 U.S. (71 L. ed.) 1085 at 1090.

"The idea which is now sought to be read into

the grant by Congress to the Administrator * * * is not so complicated nor is English speech so poor that words were not easily available to express the idea or at least to suggest it. After all, legislation * * * is addressed to the common run of men and is therefore to be understood according to the source of the thing, as the ordinary man has a right to rely on ordinary words addressed to him."

Addison v. Holly Frost Products, 322 U.S. 607 at 618 (6).

For the reasons hereinabove detailed and set forth, the Petition for Rehearing should be granted.

Respectfully submitted,

Daniel B. Trefethen

DANIEL B. TREFETHEN,
Attorney for Appellant.

CERTIFICATE OF COUNSEL PURSUANT TO COURT RULE 24

STATE OF WASHINGTON
COUNTY OF KING

ss.

DANIEL B. TREFETHEN, being first duly sworn, on oath certifies and says:

That he is the attorney for Appellant in this cause; that he is an attorney admitted to practice before the District Court of the United States for the Western District of Washington, Northern Division, and before this Court; that he makes this certificate in compliance with Rule 24 of the rules of this Court; that in his judgment the petition for rehearing and the additional and supplemental authorities presented herein, are well founded; and that the same are not interposed for delay.

Daniel B. Trefethen

Subscribed and sworn to before me at Seattle, Washington, this 29th day of September, 1947.

Geo. P. Hardy

Notary Public in and for the State of Washington, residing at Seattle.